

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL CLARK,
#67471

Plaintiff,

vs.

D.W. NEVEN,

Defendant.

2:10-cv-00944-RLH-RJJ

ORDER

This is a prisoner civil rights action. The court now reviews plaintiff's amended complaint (docket #12).

I. Screening Standard

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a

1 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*
2 *v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
5 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under
6 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,
7 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the
8 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief
9 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
10 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a
11 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,
12 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*
13 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to
14 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

15 Allegations in a *pro se* complaint are held to less stringent standards than formal
16 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.
17 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
18 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the
19 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal
20 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of
21 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual
22 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever*
23 *v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

24 To sustain an action under section 1983, a plaintiff must show (1) that the conduct
25 complained of was committed by a person acting under color of state law; and (2) that the conduct
26 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689

1 (9th Cir. 2006).

2 **II. Instant Complaint**

3 In his amended complaint, plaintiff, who is incarcerated at High Desert State Prison
4 (“HDSP”), has sued HDSP Warden D.W. Neven and law library supervisor Mrs. Pharris. Plaintiff
5 alleges that defendant Pharris refused to go or delayed in going to the disciplinary segregation unit and
6 then when she went she merely signed in and then left without assisting any segregation inmates, with
7 the result that plaintiff was unable to file documents in a federal action that he identifies. He claims that
8 Neven was informed of this by senior officer Brown and by plaintiff’s grievance, which he denied.
9 Plaintiff further asserts that upon his release from disciplinary segregation, Pharris harassed and
10 intimidated him, threatened to bar him from the law library and filed false disciplinary charges against
11 him in retaliation for filing a grievance against her and a lawsuit regarding the law library. Plaintiff
12 claims defendants have violated his right to meaningful access to the courts and to be free from
13 retaliation.

14 As an initial matter, plaintiff merely states, without elaboration, that his Fourth, Fifth,
15 Eighth, and Fourteenth Amendment rights have been violated. He sets forth no facts whatsoever
16 implicating his rights under these constitutional provisions. Moreover, his Eighth and Fourteenth
17 Amendment claims were dismissed from his original complaint with prejudice and without leave to
18 amend (see docket #7). Accordingly, plaintiff’s Fourth, Fifth, Eighth, and Fourteenth Amendment
19 claims set forth in his amended complaint are dismissed with prejudice and without leave to amend.

20 With respect to plaintiff’s claims that Pharris refused to assist inmates in disciplinary
21 segregation, preventing plaintiff from filing documents in an ongoing action, and that Neven was made
22 aware of the situation, prisoners have a constitutional right of access to the courts. *See Lewis v. Casey*,
23 518 U.S. 343, 346 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977), *limited in part on other grounds*
24 *by Lewis*, 518 U.S. at 354; *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990). This right “requires prison
25 authorities to assist inmates in the preparation and filing of meaningful legal papers by providing
26 prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Bounds*,

1 430 U.S. at 828; *see also Madrid v. Gomez*, 190 F.3d 990, 995 (9th Cir. 1999). The right, however,
2 “guarantees no particular methodology but rather the conferral of a capability—the capability of bringing
3 contemplated challenges to sentences or conditions of confinement before the courts [It is this
4 capability] rather than the capability of turning pages in a law library, that is the touchstone” of the right
5 of access to the courts. *Lewis*, 518 U.S. at 356-57. Prison officials may select the best method to ensure
6 that prisoners will have the capability to file suit. *See id.* at 356. Prisons “might replace libraries with
7 some minimal access to legal advice and a system of court-provided forms . . . that asked the inmates
8 to provide only the facts and not to attempt any legal analysis.” *Id.* at 352.

9 To establish a violation of the right of access to the courts, a prisoner must establish that
10 he or she has suffered an actual injury, a jurisdictional requirement that flows from the standing doctrine
11 and may not be waived. *See Lewis*, 518 U.S. at 349; *Madrid*, 190 F.3d at 996. An “actual injury” is
12 “actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing
13 deadline or to present a claim.” *Lewis*, 518 U.S. at 348 (citation and internal quotations omitted); *see*
14 *also Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) (explaining that “[f]ailure to show that a
15 ‘non-frivolous legal claim ha[s] been frustrated’ is fatal” to a claim for denial of access to legal
16 materials) (citing *Lewis*, 518 U.S. at 353 & n.4); *Madrid*, 190 F.3d at 996. Delays in providing legal
17 materials or assistance that result in actual injury are “not of constitutional significance” if “they are the
18 product of prison regulations reasonably related to legitimate penological interests.” *Lewis*, 518 U.S.
19 at 362. The right of access to the courts is limited to non-frivolous direct criminal appeals, *habeas*
20 *corpus* proceedings, and § 1983 actions. *See Lewis*, 518 U.S. at 353 n.3 & 354-55; *Simmons v.*
21 *Sacramento County Superior Court*, 318 F.3d 1156, 1159-60 (9th Cir. 2003) (explaining that “a prisoner
22 has no constitutional right of access to the courts to litigate an unrelated civil claim.”); *Madrid*, 190 F.3d
23 at 995. Plaintiff states a claim against defendants for denial of access to the courts.

24 With respect to plaintiff’s claim that Pharris threatened to bar him from the law library
25 and filed false disciplinary charges against him in retaliation for plaintiff filing a grievance against her
26 and a lawsuit regarding the law library, allegations of retaliation against a prisoner’s First Amendment

rights to speech or to petition the government may support a section 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989). To establish a prima facie case, plaintiff must allege and show that defendants acted to retaliate for his exercise of a protected activity, and defendants' actions did not serve a legitimate penological purpose. *See Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994); *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). A plaintiff asserting a retaliation claim must demonstrate a "but-for" causal nexus between the alleged retaliation and plaintiff's protected activity (*i.e.*, filing a legal action). *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir. 1979); *see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The prisoner must submit evidence, either direct or circumstantial, to establish a link between the exercise of constitutional rights and the allegedly retaliatory action. *Pratt*, 65 F.3d at 806. Timing of the events surrounding the alleged retaliation may constitute circumstantial evidence of retaliatory intent. *See Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Plaintiff states a First Amendment claim against defendant Pharris.

III. Conclusion

IT IS THEREFORE ORDERED that plaintiff's access to courts claim **MAY PROCEED**.

IT IS FURTHER ORDERED that plaintiff's retaliation claim **MAY PROCEED**.

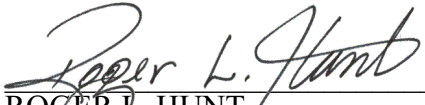
IT IS FURTHER ORDERED that plaintiff's Fourth, Fifth, Eighth and Fourteenth Amendment claims are **DISMISSED** with prejudice and without leave to amend.

IT IS FURTHER ORDERED that the Clerk **shall electronically serve a copy of this order, along with a copy of plaintiff's complaint, on the Office of the Attorney General of the State of Nevada, attention Pamela Sharp**. The Attorney General shall advise the Court within **twenty-one (21) days** of the date of entry of this order whether they can accept service of process for the named defendants and the last known address under seal of the defendants for which they cannot accept service. If the Attorney General accepts service of process for any named defendant(s), such defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days** of the date of the

1 notice of acceptance of service.

2 **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,
3 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or
4 other document submitted for consideration by the Court. Plaintiff shall include with the original paper
5 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed
6 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff
7 shall direct service to the individual attorney named in the notice of appearance, at the address stated
8 therein. The Court may disregard any paper received by a district judge or a magistrate judge that has
9 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

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12 DATED this 16th day of November, 2010.

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15 ROGER L. HUNT
16 Chief United States District Judge
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